Supreme Court, U.S.
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No. 09- 091128

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IN THE

Supreme Court of the United States

DANIEL J. SEGAL, on behalf of himself, his minor children and all others similarly situated,
Petitioner,

v.

FIFTH THIRD BANK, N.A., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 16, 2010

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QUESTION PRESENTED FOR REVIEW

Did the Sixth Circuit err in holding that, in conflict with other circuits, a class action alleging traditional state-law breach of fiduciary duty and contract claims that are not premised on any misrepresentation, omission, or other deceptive conduct that could violate the federal securities laws or induce the purchase, sale, or retention of a security, is precluded by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §78bb(f)(1), if any conduct incidental to those claims involved a transaction in a security?

RULE 14.1(b) STATEMENT

Petitioner, who was the plaintiff-appellant below, is Daniel J. Segal, on behalf of himself, his minor children, Alex J. Segal and Graham H. Segal, and all others similarly situated.

Petitioner does not have a parent or subsidiary company.

The Respondents, who were the defendants/appellees below, are Fifth Third Bank, N.A. (the "Bank") and its corporate parent, Fifth Third Bancorp.

The putative classes were defined as follows:

(1) The Beneficiary Class consisting of all beneficiaries of trust, estate, or other fiduciary accounts for which the Bank or any of its predecessors acted as a trustee, executor, or other form of corporate fiduciary at any time from March 1, 2001 to the present.

(2) The Proprietary Funds Class consisting of all Beneficiary Class members whose trust, estate, or other fiduciary accounts, for which the Bank or any of its predecessors acted as a trustee, had, directly or indirectly, Proprietary Fund assets allocated to any such account at any time during the Class Period.

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The opinion of the Court of Appeals is reported at 581 F.3d 305 (6th Cir. 2009) and reprinted in the Appendix. (App. 1a-11a). The opinion of the district court is not reported. (App. 12a-25a). The order denying Petitioner's motion for rehearing and rehearing *en banc* is not reported. (App. 26a).

JURISDICTION

The judgment of the Court of Appeals was entered on September 17, 2009. The order denying Petitioner's motion for rehearing and rehearing *en banc* was entered on December 16, 2009. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The question presented by this petition involves the Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. §78bb(f)(1) ("SLUSA"), which provides in relevant part:

> 1) Class action limitations. No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging
>
> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

INTRODUCTION

This case presents an exceptionally important and recurring question of the preclusive scope of SLUSA under the Court's decision in *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71 (2006). Since *Dabit*, courts of appeals have inconsistently interpreted the scope of the preclusive effect of SLUSA on traditional state law claims, leading to vastly different outcomes on similar sets of facts. The Sixth Circuit departed from other circuits in expanding *Dabit's* narrow preclusion of "'certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [Private Securities Litigation Reform Act of 1995, 15 U.S.C. §78u-4 *et seq.* ("PSLRA")]," 547 U.S. at 86, to preclusion of all "state-law ***securities-related*** claims," 581 F.3d at 308 (App. 2a) (emphasis added). Based on the Sixth Circuit's overbroad interpretation of SLUSA and *Dabit*, virtually every state law claim for breach of fiduciary duty or breach of contract can be re-cast by a defendant into a claim that arguably sounds in fraud and thus be precluded by SLUSA if, no matter how collateral to the cause of action or the defendant's conduct, it somehow touched upon a securities transaction. This cannot be harmonized with SLUSA's language or its congressional purpose.

Dabit resolved the narrow question of whether SLUSA precluded state-law claims brought by holders of securities, as well as those of purchasers and sellers, where the underlying conduct of the defendants would otherwise constitute a traditional federal securities law claim. While other circuits have correctly recognized *Dabit's* limited holding, the

Sixth Circuit, premised on this Court's comment in *Dabit* that "Congress envisioned a broad construction" of SLUSA, *Dabit*, 547 U.S. at 86, misread *Dabit*, ignored Congress' intent, and extended SLUSA past its statutory breaking point. In so doing, the Sixth Circuit departed from numerous other circuits which have read SLUSA and *Dabit* to preclude disguised federal securities claims, but not traditional state law causes of action that lack any of the essential elements of a federal securities fraud claim or fall outside the remedial purposes of the federal securities laws. This case is thus an appropriate vehicle for the Court not only to resolve this conflict between the circuits, but also, more importantly, to provide guidance on the proper application of SLUSA to a broad universe of potential claims.

Congress enacted SLUSA to close a perceived "loophole" in the PSLRA that allowed plaintiffs to circumvent the PSLRA's heightened pleading requirements by bringing state law claims, that were actually disguised securities fraud claims, in state court. *See Dabit*, 547 U.S. at 82, 87. SLUSA's narrow purpose is "[t]o stem th[e] 'shif[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA]." *Id.* at 82 (citation omitted). In *Dabit*, the only issue was whether a person induced to continue holding a security based on alleged conduct that would otherwise indisputably violate §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) ("§10(b)"), met the "in connection with" requirement

of SLUSA. *Dabit*, 547 U.S. at 85. The Court resolved this narrow issue by holding that "[t]he requisite showing . . . is 'deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller.'" *Id.*

Since *Dabit*, several circuits have acknowledged that *Dabit* broadened SLUSA's preclusive effect to those who were induced to continue holding a security in reliance on misinformation. The Sixth Circuit, however, read *Dabit* as expanding the preclusive effect of SLUSA to virtually any claim for breach of a common law or contractual duty where, no matter how attenuated, a security is somehow involved. Left undisturbed, this decision will have the wide-ranging, exceptionally devastating consequence of eliminating any class-wide recourse for, among many others, trust and estate beneficiaries against trustees and other similar fiduciaries for breaches of trust and contract for non-fraudulent mismanagement of fiduciary funds, thereby closing the courthouse doors to small claimants for whom the class action device provides the only practical means to vindicate their rights. Nothing in the plain language or legislative history of SLUSA or in *Dabit* supports such a result.

Based on inconsistent readings of SLUSA and *Dabit*, the circuits have also split on whether SLUSA applies to claims that are not dependent on misrepresentations, deceptive conduct, or do not otherwise implicate the elements of a traditional federal securities law claim. The Sixth Circuit held that a plaintiff cannot avoid SLUSA preclusion if the complaint alleges, expressly or impliedly, any type of

deception, whether or not it is relevant to the actual causes of action asserted, and a subsequent securities transaction, whether or not the deception and the securities transaction had any connection to one another. In contrast, the Second, Third, Fifth, Seventh, and Ninth Circuits have properly determined that SLUSA does not preclude state law class action claims where alleged misrepresentations are simply background details and where the plaintiff was not induced to any action (or, as in *Dabit*, inaction) by the misrepresentations.

There is also widespread inconsistency among the circuits as to whether SLUSA preclusion applies on a claim-by-claim basis, or to the action as a whole. While the Second, Third, and Ninth Circuits appropriately apply SLUSA narrowly and allow unaffected claims to survive, the Sixth Circuit interprets SLUSA preclusion broadly and reads the statute as precluding the entire action even if some claims do not fall, standing alone, within SLUSA's ambit.

Due to this ever-widening split among the circuits on these fundamental issues regarding SLUSA's preclusive scope on traditional state law claims based, in large part, on variant readings of *Dabit*, the Court needs to intervene in order to protect Congress' express goal with SLUSA of applying uniform standards to deceptions in connection with transactions in securities.

STATEMENT OF THE CASE

Nature of Action; Proceedings and Disposition in the District Court

On October 19, 2007, Petitioner Daniel J. Segal filed the Amended Class Action Complaint ("Complaint") on his own behalf, and on behalf of his minor children and two putative Classes. The Complaint alleges state law claims against Respondents, Fifth Third Bank, N.A. (the "Bank") and the Bank's corporate parent, Fifth Third Bancorp, for breach of fiduciary duty for their failure to fulfill their obligations as trustee; breach of contract for their failure to provide the services they contracted to provide; and unjust enrichment for receiving payments for services they did not provide.

Specifically, the Complaint alleges that, under the common law and by contract, Respondents were required to provide individualized asset management and allocation services based on the needs of each trust and that Respondents charged trustees fees for these purported services. Further, the Complaint alleges that in breach of those fiduciary and contractual duties, Respondents did not provide the requisite services, but instead arbitrarily placed trust assets in their own proprietary mutual funds and thereby received fees and expenses for administration and management of the funds over and above the trustees' fees. Additionally, the Complaint alleges that when the fiduciary accounts were subject to estate, trust, or other tax obligations, Respondents segregated excessive amounts of trust funds to pay those near-term tax liabilities, usually by allocating the funds to low-yielding vehicles.

Thus, Respondents were alleged to have misallocated — and thereby mismanaged — the cash in the trusts.

Importantly, the Complaint does not allege that Respondents engaged in any of this conduct deceptively, or even in secret; rather, the trust beneficiaries regularly received reports showing where the trust assets were placed. However, as a trust beneficiary, Petitioner had no power or control over the allocation or disposition of his trust assets. Only Respondents, subject to their fiduciary and contractual obligations, had that authority. Therefore, the claims in the Complaint sound in contract and fiduciary mismanagement, not in fraud, and the Complaint does not — and could not — allege a federal securities law violation. Likewise, the causes of action are not based on any misrepresentation or failure to disclose material facts that induced Petitioner to take or not take any action in connection with the use of the trusts' assets. Instead, the gravamen of the Complaint is that Respondents failed to provide certain required services as trustee; therefore, the relief sought by Petitioner is recompense from Respondents for their failures to provide those services.

On November 30, 2007, Respondents filed their motion to dismiss the Complaint. On March 25, 2008, the District Court issued an order, without hearing oral argument, dismissing the class claims with prejudice based on SLUSA preclusion. The District Court also dismissed Petitioner's individual claims without prejudice. (App. 25a). Noting that the Sixth Circuit provides no definitive guidance on this question, the District Court concluded that

"[w]hile the alleged misconduct may have breached a contract or fiduciary duty, it is also a 'quintessential example of a fraudulent omission of a material fact under the federal securities laws.'" (App. 20a-21a) (citation omitted). The District Court also found that Respondents' conduct was "in connection with" the purchase or sale of securities because it concluded that Petitioner "allege[s] a course of fraudulent conduct involving . . . [the] decision to purchase [ ] mutual funds." (App. 25a). The District Court determined, based on its reading of *Dabit*, that "it is enough for 10(b) and 10b-5 actions that the fraud 'coincide with a securities transaction — whether by the plaintiff or by someone else.'" (App. 23a) (citation omitted).

The Sixth Circuit's Decision

On September 17, 2009, the Sixth Circuit affirmed the dismissal of Petitioner's class claims as precluded by SLUSA. *See* 581 F.3d 305 (App. 1a-11a). Because the parties agreed that the action was a covered class action based on state law and involving covered securities, the Sixth Circuit focused on answering only one question:

> Does the [ ] [C]omplaint] allege an "untrue statement" or a "material omission" of fact "in connection with the purchase or sale" of Fifth Third mutual funds or allege that the Bank used a "manipulative or deceptive device or contrivance in connection with the purchase or sale" of Fifth Third mutual funds?

Id. at 309 (App. 5a).

The Sixth Circuit began its analysis by selecting several phrases from the Complaint, that were provided as part of the background, and stringing them together to find, *albeit* incorrectly, that the Complaint "alleges misrepresentations, material omissions and manipulation." *See id.* (App. 5a). The Sixth Circuit stated:

> Consider: it alleges that Fifth Third failed to inform trust beneficiaries that their trust accounts would be invested in proprietary mutual funds; that the Bank carried out a "planned corporate scheme" that was "intended to (and did) lure grantors, testators, and others to designate [Fifth Third as trustee]," Am. Compl. ¶¶ 25, 29; that the Bank purported to "provide planning 'advice' under the guise that the advice was customized when, in fact, it [was] not," Am. Compl. ¶ 35; that the Bank "did not deal honestly, ethically, fairly, and/or in good faith" with the class, Am. Compl. ¶ 6; that the Bank intentionally and "knowingly overcharged" its trust clients, Am. Compl. ¶ 75; and that the Bank's policies amounted to a "scheme." Am. Compl. ¶¶ 25, 29, 38–39, 49–51, 59, 64, 66–67, 70, 75, 84.

581 F.3d at 309-10 (App. 5a).

Next, the Sixth Circuit turned to the "in connection with" clause, holding that the "[C]omplaint also alleges that Fifth Third made misrepresentations to the trust beneficiaries and otherwise manipulated them 'in connection with' the sale of Fifth Third mutual funds, a conclusion that follows from *Dabit*." *Id.* at 310. (App 5a-6a).

Recasting Petitioner's claims, the Sixth Circuit found that "[a]ll of Segal's counts — breach of fiduciary duty, unjust enrichment, breach of contract — revolve around Fifth Third's decision to buy mutual fund shares. Segal's allegations do not merely 'coincide' with securities transactions; they depend on them." *See id.* (App. 6a).

Despite the Complaint expressly disclaiming that Petitioner's claims are based on misrepresentation or manipulation, the Sixth Circuit, notwithstanding its recognition that Petitioner is the "'master of his complaint,'" *see id.* at 312 (App. 10a) (citation omitted), held that "he cannot avoid [SLUSA's] application through artful pleading that removes the covered words from the complaint but leaves in the covered concepts." *Id.* at 311 (App. 7a) (internal citations omitted). The Sixth Circuit also discarded the proposition that because Petitioner's state-law claims do not depend on any allegations of misrepresentation or manipulation, they are not material to them, erroneously finding that "[t]he Act does not ask whether the complaint makes 'material' or 'dependent' allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple." *See id.* (App. 8a). The Sixth Circuit, in reliance on the single, out of context comment in *Dabit* that "SLUSA's prohibitions must be 'broad[ly]' construed," further stated that "it becomes clear that we have no license to draw a line between SLUSA-covered claims that must be dismissed and SLUSA-covered claims that must not be." *See id.* (App. 9a) (citing *Dabit*, 547

U.S. at 86). Noting that the Third Circuit's decision in *LaSala v. Bordier et Cie*, 519 F.3d 121 (3d Cir. 2008), "appears to provide some support for [Petitioner's] position on this point," the Sixth Circuit instead relied on *Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294 (3d Cir. 2005), even though the later *LaSala* decision applied the test it set forth in *Rowinski* when it found that SLUSA did not preclude the type of claims Petitioner alleges. *See* 581 F.3d at 311-12. (App. 9a).

The Sixth Circuit also rejected Petitioner's argument that the claims should be precluded only if "the underlying factual allegations would otherwise give rise to an actionable claim under federal securities laws." *See id.* at 312. (App. 10a). Finally, the Sixth Circuit disagreed with Petitioner that precluding such claims as in the Complaint "'eliminate[s] any remedy against an unfaithful fiduciary' short of removing the trustee," *see id.* at 312 (App. 10a), and justified its holding, in part, on the availability of certain, non-class remedies. *See id.* (App. 10a-11a).

Petitioner timely filed a petition for rehearing and for rehearing *en banc*, which was summarily denied. (App. 26a).

REASONS FOR GRANTING THE PETITION

The Court should grant writ of *certiorari* to address the critical and prevalent question of the preclusive scope of SLUSA. The Court previously addressed the scope of SLUSA in a different context in *Dabit* to resolve the split between the circuits over whether SLUSA applied to claims brought solely on

behalf of persons who were induced to hold (but not purchase or sell) securities. Although *Dabit* only addressed this narrow question, in the four years since *Dabit*, based on variant readings of SLUSA and *Dabit*, the circuits have widely divided on the types of traditional state law claims precluded. Therefore, a pressing need exists for the Court to set a uniform standard and resolve the split of authority among the circuits.

I. Background of SLUSA and *Dabit*

A. Congress Intended SLUSA to Preclude Avoidance of the PSLRA's Requirements in Federal Securities Fraud Actions

Congress enacted the PSLRA to curb "perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Dabit*, 547 U.S. at 81. The PSLRA imposed heightened pleading requirements in actions brought pursuant to §10(b). *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005). However, as a consequence of the PSLRA's pleading requirement, some plaintiffs attempted to circumvent the statute by filing their securities fraud cases in state court. Congress responded with SLUSA. As the Court explained:

> The effort to deter . . . those suits whose nuisance value outweighs their merits . . . had an unintended consequence: It prompted at least some members of the plaintiffs' bar to avoid the federal forum altogether. Rather than face the obstacles set in their path . . . plaintiffs and their representatives began bringing class actions under state law, often in

> state court. . . . To stem this "shif[t] from Federal to State courts" and "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" the Reform Act, SLUSA §§ 2(2), (5), 112 Stat. 3227, Congress enacted SLUSA.

Dabit, 547 U.S at 82.

SLUSA seeks to ensure that securities fraud cases are heard only under the strict, uniform standards prescribed by federal law. Thus, the legislative history and the text of the statute make clear that Congress meant only to preclude class claims for conduct traditionally remedied under the federal securities laws, brought in state court to evade the PSLRA.

To establish SLUSA preclusion, four conditions must be met: (1) the underlying suit must be a "covered class action"; (2) the action must be based on state or local law; (3) the action must concern a "covered security"; and (4) the defendant must have misrepresented or omitted a material fact or employed a manipulative device or contrivance "in connection with the purchase or sale" of that security. 15 U.S.C. §78bb(f)(1). Although the "in connection with" language was left undefined by the statute, courts interpreting that phrase have looked at §10(b) and Rule 10b-5 for guidance. *See Dabit*, 547 U.S. at 86 ("Application of that presumption is particularly apt here; not only did Congress use the same words as are used in §10(b) and Rule 10b-5, but it used them in a provision that appears in the same statute as §10(b)."); *Gray v. Seaboard Sec., Inc.*, No.

03-7184, 2005 U.S. App. LEXIS 4098, at *5 n.2 (2d Cir. Mar. 9, 2005).

Thus, SLUSA preclusion only applies where a defendant's alleged conduct would constitute a violation of the federal securities laws. A proper claim under §10(b) must allege: (i) the misstatement or omission of a material fact, (ii) made with scienter, (iii) in connection with the purchase or sale of securities, (iv) upon which the plaintiff justifiably relied, and (v) which proximately caused the plaintiff's injury. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). As the Sixth Circuit stated,

> [S]ecurities laws are clear. They mandate disclosure of certain things . . . and then they allow the company to remain silent regarding other matters if it so chooses. If it in fact chooses to speak, then it must make sure that what it says does not mislead investors into believing something that is untrue. . . . Plaintiffs cannot, however, turn the silence that the securities laws permit into liability.

J&R Mktg., SEP v. GMC, 519 F.3d 552, 564 (6th Cir. 2008) (citations omitted).

In the instant case, Petitioner does not allege a specific misrepresentation or omission, or that he was induced to act or not act "in connection with" any security. Instead, as a trust beneficiary, Petitioner had no power over disposition of the trust assets and, therefore, even if omissions and/or misrepresentations were alleged, they could not form a claim under the federal securities laws because

such deceptive conduct by Respondents could not induce any conduct — whether to buy, sell, or hold — by Petitioner.

B. The Narrow Holding of *Dabit*

After SLUSA was enacted, the Second and Seventh Circuits diverged as to whether SLUSA preempted state-law holder class actions that otherwise included all of the elements of a §10(b) claim, but did not allege any purchase or sale — but only the retention — of a covered security. The Second Circuit in *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005), held that "the purchaser-seller rule of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975), applies as a limit on SLUSA's 'in connection with' requirement such that SLUSA does not preempt claims that do not allege purchases or sales made by the plaintiff or the alleged class members." *Id.* at 28. Thus, because plaintiffs were fraudulently induced not to sell the covered securities, but instead to continue holding them, their state law claims fell outside of SLUSA's scope. Four months after the Second Circuit's decision, the Seventh Circuit, in *Kircher v. Putnam Funds Trust*, 403 F.3d 478 (7th Cir. 2005), rejected the Second Circuit's approach excluding holders from the scope of SLUSA, finding that "SLUSA is as broad as §10(b) itself and that limitations on private rights of action to enforce §10(b) and Rule 10b-5 do not open the door to litigation about securities transactions under state law. Plaintiffs' claims are connected to their own purchases of securities and thus are blocked by SLUSA." *See id.* at 484.

This Court granted *certiorari* to resolve the split. The Court held that for purposes of SLUSA, the distinction between holders and purchasers or sellers of securities is irrelevant and the identity of plaintiffs does not determine whether the complaint alleges fraud "in connection with the purchase or sale" of securities. Thus, *Dabit* did not touch the Court's precedent interpreting whether a misrepresentation occurred "in connection with" the purchase or sale of a covered security. In fact, *Dabit* specifically directed that pre-SLUSA case law should be applied in interpreting the "in connection with" requirement under SLUSA. *See* 547 U.S. at 85-86. Therefore, the Sixth Circuit's expansion of the narrow holding of *Dabit* from precluding investors induced by a securities fraud to retain a security to precluding beneficiaries of fiduciary accounts, with no investment authority, who could not rely on misrepresentations and/or omissions to buy, sell, or hold a covered security stretches SLUSA beyond its language and any intended purpose the drafters of SLUSA could have envisioned.

II. The Sixth Circuit Decision Improperly Expanded the Narrow Holding of *Dabit*

The Sixth Circuit's wholesale expansion of SLUSA preclusion to all "state-law ***securities-related*** claims," *see* 581 F.3d at 308 (App. 2a) (emphasis added), is at odds with the statute's language, Congress' purpose in enacting it, and the Court's precedent, including *Dabit*. The type of claims precluded under the Sixth Circuit decision are traditional state-law claims that this Court carefully

distinguished from the type of claim asserted in *Dabit*, and are instead the type of claim this Court has repeatedly excluded from the reach of the federal securities laws. *See Dabit*, 547 U.S. at 87 ("[W]e do not lose sight of the general 'presum[ption] that Congress does not cavalierly pre-empt state-law causes of action.'"). Thus, it is hardly surprising that the Sixth Circuit's analysis and decision markedly diverges from those of other circuits.

The Sixth Circuit found that Petitioner's claims were precluded by SLUSA in reliance on a single comment in *Dabit* — that "Congress envisioned a broad construction" of SLUSA, which the Sixth Circuit applied without regard to the limited factual and legal context in which that comment was made. *See Dabit*, 547 U.S. at 86-87. In *Dabit*, the complaint alleged every element of a conventional federal securities law violation: "[t]he holder class action that respondent tried to plead . . . is distinguishable from a typical Rule 10b-5 class action in only one respect: It is brought by holders instead of purchasers or sellers." 547 U.S. at 88-89. Therefore, in *Dabit*, the only issue was whether a person fraudulently induced to continue holding a security based on what were otherwise indisputable allegations of a §10(b) violation was precluded by the "in connection with" requirement of SLUSA. It was solely to this determination that the Court applied its "broader interpretation of the statutory language" comment by holding that "[t]he requisite showing . . . is 'deception 'in connection with the purchase or sale of any security,' not deception of an identifiable purchaser or seller.'" *Id.*

Importantly, *Dabit* makes clear that SLUSA preclusion turns on "deception" inducing an investment decision in a particular security. *See* 547 U.S. at 85. The Sixth Circuit, needing to find a "deception" upon Petitioner as required by *Dabit*, stretched this Court's comment that SLUSA is subject to a "broad construction" by ignoring the requirement that a complaint be construed in the manner most amenable to finding that the claims are not precluded by SLUSA, *see Dabit,* 395 F.3d at 31 (applying Rule 12(b)(6) standard in SLUSA context), *overruled on other grounds*, 547 U.S. 71; *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 683 (6th Cir. 2004), and found that SLUSA required it to impute theories to Petitioner's claims not alleged if they could conceivably be converted from claims for breaches of fiduciary duty and contract to ones that sound in fraud. *See* 581 F.3d at 311 (App. 8a-9a).

This Court predicated its *Dabit* decision on concerns that, absent SLUSA preclusion of holder claims, federal and state class actions would proceed simultaneously, leading to inconsistent results; a situation that would "squarely conflict[ ] with the congressional preference for 'national standards for securities class action lawsuits involving nationally traded securities.'" *Id.* at 86-87 (citing SLUSA §2(5), 112 Stat. 3227) (footnote omitted). In determining whether a claim is precluded by SLUSA, this Court highlighted the importance of considering whether the state-law claim at issue was one that was traditionally pursued under state or federal law, noting that "federal law, not state law, has long been the principal vehicle for asserting class-action

securities fraud claims," and that "while state-law holder claims were theoretically available . . . the assertion of such claims by way of class action was virtually unheard of before SLUSA." *Id.* Thus, the Court concluded that *Dabit* was "hardly a situation, then, in which a federal statute has eliminated a historically entrenched state-law remedy." *Id.* (citing *Bates v. Dow Agroscience LLC*, 544 U.S. 431, 449 (2005) (observing that a "long history" of state law tort remedy "add[ed] force" to the presumption against pre-emption)).

Plainly, the type of breach of fiduciary duty and contract claims asserted by Petitioner are claims traditionally asserted under state law, and SLUSA preclusion of those claims would, indeed, "eliminate [ ] historically entrenched state-law remed[ies]." *See id.* For instance, if a trustee responsible for a large number of trusts secretly "borrowed" the cash assets of those trusts to cover margin on his own personal brokerage account, under the Sixth Circuit's decision, because the trustee used the trust funds for a "securities-related" purpose, the trust beneficiaries would be precluded by SLUSA from pursuing their state-law breach of fiduciary duty, contract, and conversion claims on a class basis against the wrongdoer-trustee. Thus, the Sixth Circuit's distortion of *Dabit's* SLUSA preclusion of "'certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives' of the [PSLRA]," 547 U.S. at 86, to preclusion of all "state-law ***securities-related*** claims," 581 F.3d at 308 (App. 2a) (emphasis added), is clearly beyond the holding of *Dabit* and the scope of SLUSA.

In *Stoneridge*, 552 U.S. 148, this Court reaffirmed the limited scope of the federal securities laws:

> Were the implied cause of action to be extended to the practices described here, however, there would be a risk that the federal power would be used to invite litigation beyond the immediate sphere of securities litigation and in areas already governed by functioning and effective state-law guarantees. Our precedents counsel against this extension. . . . Though § 10(b) is "not 'limited to preserving the integrity of the securities markets . . .,'" it does not reach all commercial transactions that are fraudulent and affect the price of a security in some attenuated way.

Id. at 161-62 (citing *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud."); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479-80 (1977) ("There may well be a need for uniform federal fiduciary standards. . . . But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to 'cover the corporate universe.'") (citation omitted)); *see also SEC v. Zandford*, 535 U.S. 813, 820 (2002) ("[§10(b)] must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation.").

Previously, in *Santa Fe*, this Court emphasized the importance of respecting congressional intent in construing federal securities statutes in refusing to include breaches of fiduciary duty and mismanagement into conduct actionable under the

federal securities laws. As the Court noted, allowing the federal securities laws to govern such conduct:

> would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation. . . . Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.

430 U.S. at 477-79 (citations omitted).

The Court also noted that Congress did not intend to "bring within the scope of §10(b) instances of corporate mismanagement such as this, in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary," *id.* at 477, finding that "once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." *Id.* at 477-78 (citations omitted). The Sixth Circuit's preclusion of traditional breach of fiduciary duty and contract claims that only tangentially involve securities conflicts with this long-standing congressional policy regarding the limited reach of the federal securities laws.

Moreover, the Sixth Circuit justified its holding, in part, on the availability of other remedies, but such a consideration is irrelevant. Unlike in *Dabit*, where all of the elements of a securities law violation were alleged, the Sixth Circuit applied SLUSA to traditional state-law claims that are not cognizable

under the federal securities laws, and thus eliminated the class action device for claims involving conduct-based traditional breaches of fiduciary and contractual duties. Without the class action device, beneficiaries of small trusts have no practical remedy to redress such misconduct. *See, e.g., Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338-39 (1980).

III. The Sixth Circuit Decision Is Contrary to the Decisions of Other Circuits

A. The Sixth Circuit Decision Is Inconsistent with Circuits that Require a Causal Connection Between the Fraud and the Securities Transaction

The Sixth Circuit decision splits with circuits that have only applied SLUSA, post-*Dabit*, where some detrimental reliance on a misrepresentation or omission is alleged. Indeed, *Dabit* instructs that the "requisite showing" for SLUSA preclusion is "deception 'in connection with the purchase or sale of any security.'" 547 U.S. at 85 (citation omitted). "[T]he critical question is whether [the] amended complaint can reasonably be read as alleging a sale or purchase of a covered security made in reliance on the allegedly faulty information provided to himself and to putative class members. . . ." *Santa Fe*, 279 F.3d at 598.[1] The Court has also previously stated:

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[1] Although *Dabit* overruled a portion of the holding in *Santa Fe* dealing with holders, the case is still valid and has been relied upon for its interpretation of SLUSA's requirements. *See, e.g., Gavin v. AT&T Corp.*, 464 F.3d 634, 639-40 (7th Cir. 2006)

> Reliance by the plaintiff . . . is an essential element. . . . It ensures that, for liability to arise, the "requisite causal connection between a defendant's misrepresentation and a plaintiff's injury" exists as a predicate for liability. . . .

Stoneridge, 552 U.S. at 159 (internal citations omitted).

In the instant case, reliance is neither an element of any of Petitioner's claims, nor does Petitioner allege reliance to his detriment on any misstatement or omission by Respondents regarding a particular securities investment. Such an allegation would be nonsensical because Respondents had sole authority over disposition of the trust assets, and, thus, Petitioner could not be induced by any deception to purchase, sell or hold any security. Because reliance was not an element of Petitioner's claims, the claims should not have been precluded by SLUSA.

Cases interpreting *Dabit* have held that for a claim to be precluded a causal connection between the fraud and the securities transaction is required, *i.e.*, that the alleged fraudulent conduct induced someone to act or not act to his detriment. *See, e.g.*, *Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 877 (8th Cir. 2006) ("'[T]he critical question is whether [the] complaint can reasonably be read as alleging a sale or purchase of a covered security ***made in reliance*** on the allegedly faulty information.'") (citation omitted; emphasis added). Even *Dabit*

(finding that SLUSA is not applicable because defendants did not influence the purchase or sale of security).

makes clear that "the brokers allegedly ***relied*** on the analysts' reports in advising their investor clients and ***in deciding whether or not to sell their own holdings***, and the ***clients and brokers both continued to hold their stocks long beyond the point when***, had the truth been known, ***they would have sold***." 547 U.S. at 75 (emphasis added). *See also Gavin*, 464 F.3d at 639-40 (finding no SLUSA preclusion because defendants did not influence the purchase or sale of a security). "Reliance provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury." *Basic Inc. v. Levinson*, 485 U.S. 224, 243 (1988) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976) ("'[The bill [§10(b)] provides that any person who unlawfully manipulates the price of a security, or who induces transactions in a security by means of false or misleading statements, or who makes a false or misleading statement in the report of a corporation, shall be liable in damages to those who have bought or sold the security at prices affected by such violation or statement.")).

Therefore, as the Second, Third, Seventh, and Ninth Circuits have properly determined, SLUSA preclusion does not apply to a state law class action claim when the misrepresentations are simply background details and the plaintiff does not claim to have been induced to action or inaction by the misstatement. *See, e.g., Gavin*, 464 F.3d at 640 (refusing to apply SLUSA to "garden variety issues of state law consumer fraud" and noting that no "doubt remains" that SLUSA does not apply when the claims have nothing to do with stock manipulation,

"with failure to make full disclosure" of material facts, "with the regulation of stock exchanges, or with any other concern of federal securities law"). In *LaSala,* 519 F.3d 121, the Third Circuit likewise held that a claim for breach of fiduciary duty was not precluded by SLUSA because the alleged misrepresentations were "extraneous" and "merely background details that need not have been alleged." *Id.* at 141. The Third Circuit noted that SLUSA only precludes if the "securities-trade ingredient" is met, which is "designed to distinguish between state-law-based suits that, no matter how pleaded, in essence allege securities fraud, and those that allege other wrongs." *See id.* at 128-29. If "an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim, that ingredient is met. ***To be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail.***" *Id.* at 141 (emphasis added). *See also Ring v. AXA Fin., Inc.*, 483 F.3d 95, 101 (2d Cir. 2007) (holding that it would not "preempt and dismiss a suit that alleges fraud occurred in connection only with a promise in a contract that does not relate to a "covered security" even where another promise in the same contract does").

The Ninth Circuit in *Proctor v. Vishay Intertechnology, Inc.*, 584 F.3d 1208 (9th Cir. 2009), concluded that SLUSA preclusion only applies to a "claim [that] ***rests*** on allegations of 'misrepresentation[s] or omission[s] of a material fact in connection with the purchase or sale of securities.'" *Id.* at 1221 (emphasis added). While

agreeing with the Sixth Circuit that a "misrepresentation need not be a specific element of the claim to fall within preclusion," *id.* at 1222 n.13, the Ninth Circuit required that for a claim to rest on a misrepresentation or omission within the meaning of SLUSA, it must be specifically alleged as an "overt act[ ] . . . in furtherance" of defendants' "conspiracy" to induce investors to take disadvantageous action in connection with securities. *See id.* at 1223.

Accordingly, the Second, Third, Seventh, and Ninth Circuits make a distinction between a plaintiff induced by misrepresentations or omissions to purchase, sell or hold a security and one who was not. The Sixth Circuit's decision ignores this element in its SLUSA analysis. Indeed, in the instant case, the trustee/beneficiary relationship between Petitioner and Respondents preceded Respondents' breaches of their duties, which did not begin until Respondents subsequently developed their mutual fund business. Therefore, Petitioner could not have been induced to retain Respondents as trustees based on any deception in connection with that use of trust assets because that use did not yet exist. And, after Respondents were retained as trustee, Petitioner had no influence over Respondents' use of the trust funds and could not be induced to take any action or inaction in connection with them. Thus, the fact that Respondents changed their business strategy after being retained as trustee and misused trust assets to benefit their mutual fund business does not convert that later mismanagement into an earlier securities fraud precluded by SLUSA.

The cases relied on by the Sixth Circuit do not counsel otherwise because they all involved fraudulent manipulation of publicly traded securities. In *U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833 (9th Cir. 2007), plaintiffs' state law class claims were based on allegations of misrepresentations and fraud, *see id.* at 840, and were preempted because those plaintiffs relied on those misrepresentations, which artificially inflated the stock and injured plaintiffs. *See id.* at 839. Similarly, *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278 (10th Cir. 2008), involved allegations that the brokerage firm induced a company's president to open a margin account secured by his company's stock, and then liquidate those shares, flooding the market and driving down the price, to benefit its own accounts that had shorted the stock. *See id.* at 1283. Plaintiffs were public shareholders of the company's stock who were injured by the stock's price collapse. Therefore, the claims were premised on market manipulation of the price of a security. *See id.* at 1283, 1287-88; *see also Dabit*, 547 U.S. at 89 (same). Thus, even under the analysis of these cases, Petitioner's claims would not be precluded because he does not allege any claim based upon an underlying securities fraud or stock manipulation.

B. The Sixth Circuit Decision Is in Direct Conflict with Circuits that Allow Plaintiffs to Plead Around SLUSA

The Sixth Circuit acknowledged that Petitioner is the master of his complaint. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987); *Roddy v. Grand Trunk W. R.R.*, 395 F.3d 318, 322 (6th Cir.

2005). Nevertheless, although Petitioner had not alleged — or even used the words — "misrepresentation," "omission," or "deceptive scheme" in his Complaint, the Sixth Circuit believed that it was required under SLUSA to reformulate Petitioner's claims as sounding in fraud and bypass the theories of liability alleged in the Complaint to find SLUSA preclusion. As a result, the Sixth Circuit, in conflict with the Third, Fifth and Ninth Circuits, held that Petitioner "cannot avoid [SLUSA] application through artful pleading." 581 F.3d at 311 (App. 7a).

In *Beckett* v. *Mellon Investor Servs., LLC*, No. 06-36044, 2009 U.S. App. LEXIS 10335 (9th Cir. May 14, 2009), the Ninth Circuit reversed, in part, a dismissal under SLUSA, holding that it was an abuse of discretion to dismiss a complaint with prejudice where the plaintiff could avoid SLUSA preclusion by amending to allege, without reference to any misleading statements or omissions, that defendant's conduct, like Respondents' alleged conduct here, constituted breach of contract, breach of fiduciary duty, and unjust enrichment. *See id.* at *5-6. *See also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 535 F.3d 325, 342 n.15 (5th Cir. 2008) ("We do not reject the rules of these cases," which held plaintiffs "could avoid SLUSA through artful litigating.").

Likewise, in *LaSala*, 519 F.3d 121, the Third Circuit, the same circuit that decided *Rowinski*, 398 F.3d 294, a case relied on by the Sixth Circuit, stated:

> It is important to recognize that *Rowinski* did not hold that any time a misrepresentation is alleged, the misrepresentation-in-connection-with-a-securities-trade ingredient is present. . . . Rather, the point we made in *Rowinski* was that when an allegation of misrepresentation in connection with a securities trade, implicit or explicit, operates as a factual predicate to a legal claim, that ingredient is met. To be a factual predicate, the fact of a misrepresentation must be one that gives rise to liability, not merely an extraneous detail. This distinction is important because complaints are often filled with more information than is necessary. While it may be unwise (and, in some cases, a violation of Rule 8) to set out extraneous allegations of misrepresentations in a complaint, the inclusion of such extraneous allegations does not operate to require that the complaint must be dismissed under SLUSA.

LaSala, 519 F.3d at 141.

Even the Sixth Circuit's citations to cases on this point actually recognized that the "well-pled complaint" rule did not allow plaintiffs to amend their away around a SLUSA dismissal only when the complaint "fairly read" still contained "allegations of fraud or deception involving a covered security." *Saxton*, 494 F.3d at 842 (citation omitted); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1095-96 (11th Cir. 2002)). The *Saxton* court even stated:

> Allowing amendment of claims to avoid dismissal could allow plaintiffs to 'artfully plead' their way around federal jurisdiction and back into state court — [but] district courts that have confronted the issue have also recognized the inequity of dismissing otherwise valid and viable state law claims on the ground that plaintiff pled — perhaps inadvertently — a cause of action that may be construed as federal in nature. In light of the statutory silence on the issue in SLUSA, the existence of competing policy rationales, and the fact that the granting or denial of leave to amend is ordinarily a matter left to the discretion of the district court, we hold that SLUSA does not prohibit amendment. . . .

494 F.3d at 843.

Accordingly, not only is the Sixth Circuit in direct conflict with other circuits, but more importantly, if the holding is left undisturbed and plaintiff is no longer the "master of his complaint," any creative defense lawyer can recast virtually any cause of action into a claim for fraud. For example, any breach of contract claim can be re-characterized as a fraud claim because a broken promise can be transformed into a misrepresentation. Not only is this contrary to the language and fundamental purpose of SLUSA, the reasoning of *Dabit*, and the holdings of the other circuits, but it opens wide the flood gate for traditional state law claims to be brought in federal court in the guise of federal securities law claims.

C. The Sixth Circuit's Dismissal of the Entire Action Contradicts Other Circuits

According to the Second, Third, and Ninth Circuits, a court is to look at each of the claims in the complaint individually to analyze which, if any, is precluded by SLUSA. Under the law of these circuits, only those claims precluded by SLUSA are to be dismissed, not the entire action. This is also consistent with SLUSA's undisputed purpose "to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives" of the PSLRA. *Dabit*, 547 U.S. at 86-87 ("In concluding that SLUSA pre-empts state-law holder class-action ***claims*** of the kind alleged in Dabit's complaint, we do not lose sight of the general 'presum[ption] that Congress does not cavalierly pre-empt state-law ***causes of action***. . . .' SLUSA does not actually pre-empt any state ***cause of action***. It simply denies plaintiffs the right to use the class-action device to vindicate certain ***claims***.") (emphasis added; citation omitted).

In *In re Lord Abbett Mutual Funds Fee Litigation*, 553 F.3d 248 (3rd Cir. 2009), the Third Circuit directly addressed "whether the inclusion of a SLUSA pre-empted state-law claim in a complaint, also alleging non-SLUSA pre-empted claims, requires dismissal of the entire action." *Id.* at 254. Following a thorough analysis of SLUSA's purpose, statutory language, legislative history, and the relevant case law, *see id.* at 254-57, the Third Circuit held that "nothing in either the plain language of the statute or the legislative history suggests that

Congress intended SLUSA to have such a punitive effect," and that "[a]llowing those claims that do not fall within SLUSA's preemptive scope to proceed, while dismissing those that do, is consistent with the goals of preventing abusive securities litigation while promoting national legal standards for nationally traded securities." *Id.* at 255, 257. *See also LaSala*, 519 F.3d at 140-43 (analyzing each claim separately to determine if it is preempted by SLUSA).

The Second Circuit and the Ninth Circuit have also endorsed this application of SLUSA. In *Gray*, 2005 U.S. App. LEXIS 4098, at *3, the Second Circuit stated that "the presence of one or more preempted claims in a complaint" does not require "dismissal of the entire action under SLUSA" and found that a claim-by-claim analysis of the kind the district court undertook here is appropriate." *Id.* at *3 (citing *Dabit*, 395 F.3d at 47). In *Proctor*, the Ninth Circuit held "that SLUSA does not require dismissal of all nonprecluded claims appearing in the same complaint as a precluded claim." 584 F.3d at 1227. The Ninth Circuit looked at the statutory language of SLUSA and found that there was "no indication that the dismissal of the entire action is required." *See id.* In fact, the Ninth Circuit stated that the dismissal of only the precluded claims "fully comports with the statutory language" because "once a precluded SLUSA claim is dismissed, the complaint no longer includes a claim that rests on an allegation of [a] misrepresentation." *See id.* Additionally, the Ninth Circuit found that "the purposes of SLUSA would not be served by the dismissal of entire actions" because "Congress [never] intended to place

roadblocks in the way of federal claims or *non-precluded* state law claims." *See id.* at 1227-28. In fact, if SLUSA required that all claims be dismissed, plaintiffs would be able to "easily circumvent the statute by dividing their claims into two separate actions." *See id.* at 1228. Thus, the Ninth Circuit held that dismissing just the claims that specifically trigger SLUSA is consistent with the statutory language of SLUSA and Congress' goals in enacting SLUSA. *See also Beckett*, 2009 U.S. App. LEXIS 10335, at *4-5 n.1 (analyzing "SLUSA preemption on a claim-by-claim basis").

In contrast, the Sixth Circuit precluded the entire action under SLUSA with no such claim-by-claim analysis. If the Sixth Circuit applied the claim-by-claim analysis followed by the Second, Third, and Ninth Circuits, the claims in the Complaint here would not have been precluded. The Complaint alleges three types of acts or failures to act in violation of Respondents' traditional state law fiduciary and contractual obligations that are not precluded by SLUSA. Two of those alleged breaches of fiduciary and contractual duties — segregating excessive amounts of money for future tax obligations and not providing individualized account analysis and management — had no connection whatsoever to Respondents' subsequent change in business strategy to place trust assets into their proprietary mutual funds, which did not exist when Respondents were retained as trustee. Moreover, with respect to the decision to place trust funds in the proprietary mutual funds, the Complaint contains no allegations that Respondents effectuated

their conduct through the use of any misrepresentation or other deceptive device, or that Petitioner was induced to act or not act in connection with that conduct, which Petitioner was aware of but had no control over. The Sixth Circuit's "all-or-nothing" approach to SLUSA preclusion, therefore, runs afoul of the approach followed by the other circuits.

IV. The Sixth Circuit Decision Eliminates a Historically State Law Remedy

The policy that the federal securities laws not interfere with areas traditionally relegated to state law is a central principle of the Court's securities law jurisprudence. *See, e.g., Santa Fe*, 430 U.S. at 478-79 (refusing to extend the securities laws to cover shareholder claims for breaches of fiduciary duty and concealment by corporate directors and officers because that would "overlap and possibly interfere with" state corporate law). As the Fourth Circuit stated:

> The fundamental purpose of the Securities Exchange Act of 1934 is to implement a "philosophy of full disclosure," *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477-78, 51 L. Ed. 2d 480, 97 S. Ct. 1292 (1977), by providing participants in stock transactions with the information they need to make their investment decisions. *O'Brien v. Continental Illinois Nat. Bank & Trust*, 593 F.2d 54, 60 (7th Cir. 1979). That goal is not furthered by bringing within the ambit of §10(b) claims amounting to breach of contract or common

> law fraud which have long been the staples of state law.

Hunt v. Robinson, 852 F.2d 786, 787-88 (4th Cir. 1988) ("Plaintiff's complaint raises grievances redressable by state law. . . . [The claims are] not transformed into a federal claim simply because the object of the bargain was shares of stock.")

In *Dabit*, the Court explained that preemption was appropriate because the claims brought there were not typical claims under state law and "federal law . . . has long been the principle vehicle for asserting class-action securities fraud claims." *See* 547 U.S. at 88 ("This is hardly a situation, then, in which a federal statute has eliminated a historically entrenched state-law remedy."). In fact, *Dabit* cited *Bates*, 544 U.S. 431, for the proposition that a history of state law remedies for the claim would add power to the presumption against preemption. *Dabit*, 547 U.S. at 88. The claims alleged in the Complaint, in sharp contrast to the claims in *Dabit*, are claims that involve a "long history" of state law enforcement and a "history of a state law remedy," which Congress never meant to preclude. As the Seventh Circuit held:

> When the trustee or agent alone makes the investment decision to purchase or sell, his failure to disclose information about the purchase or sale to the beneficiary or agent does not satisfy the "in connection with" requirement of §10(b). The enforcement of fiduciary and contractual duties owed by a trustee or agent to the beneficiary or principal

> is the concern of state law, not the federal securities laws.

O'Brien, 593 F.2d at 63. *See also Gavin*, 464 F.3d at 640 ("The plaintiffs are not trying to litigate a securities fraud case, but instead a consumer fraud case against companies that have made no effort to influence the purchase or sale of a covered security. 'Congress, in enacting the securities laws, did not intend to provide a broad federal remedy for all fraud.'") (citation omitted).

The obligations of trustees and corresponding rights of trust beneficiaries are historically governed exclusively by state law, and therefore, SLUSA should not preclude the types of claims Petitioner alleges because they are traditionally "the concern of state law, not the federal securities laws." *See O'Brien*, 593 F.2d at 63. Such conduct and the remedy for such conduct fall well outside the scope of the language and purpose of SLUSA.

Therefore, due to the various inconsistent and irreconcilable approaches the circuits use in analyzing the preclusive effect of SLUSA, trust beneficiaries and other plaintiffs alleging state law class claims relating to the management of fiduciary-held assets are burdened with substantial uncertainty as to whether state common law or their contracts any longer protect their interests or whether SLUSA's preclusive scope entirely eliminates their recourse against fiduciary misfeasance. The fate of such claims now depends on the jurisdiction where the suit is filed and thus also encourages forum shopping. Therefore, Petitioner respectfully requests that the Court grant *certiorari*

to resolve the critically important question of the proper analysis of the preclusive effect of SLUSA on traditional state law claims.

CONCLUSION

For the reasons stated above, the petition for writ of *certiorari* should be granted.

March 16, 2010

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-3576

DANIEL J. SEGAL, on behalf of himself, his minor children and all others similarly situated,
Plaintiff-Appellant,

v.

FIFTH THIRD BANK, N.A., *et al.*,
Defendants-Appellees.

June 11, 2009, Argued
September 17, 2009, Decided
September 17, 2009, Filed

OPINION

JUDGES: Before: SUTTON and GRIFFIN, *Circuit Judges*; LIOI, *District Judge*.*

OPINION BY: SUTTON

SUTTON, Circuit Judge. Daniel Segal challenges the district court's dismissal of this class action, premised on state-law claims of breach of fiduciary duty and breach of contract, against Fifth Third Bank and its holding company, Fifth Third Bancorp.

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* The Honorable Sara Lioi, United States District Judge for the Northern District of Ohio, sitting by designation.

Because the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227, bars Segal's claims, we affirm.

I.

Segal is a beneficiary of trust accounts formerly administered by Fifth Third. In 2007, he sued the Bank on behalf of himself, his children and "all beneficiaries of trust, estate, or other fiduciary accounts for which the Bank . . . acted as a . . . corporate fiduciary at any time from March 1, 2001 to the present." Am. Compl. ¶ 57. Fifth Third, the complaint alleges, breached its fiduciary and contractual duties to the class in three ways: (1) It invested fiduciary assets in proprietary (and often higher-fee) Fifth Third mutual funds rather than superior funds operated by the Bank's competitors; (2) it promised trust beneficiaries that their fiduciary accounts would receive "individualized" management and breached that agreement by providing standardized and largely automated management, Am. Compl. ¶ 87, often by "relatively inexperienced" and "low-level" employees, Am. Compl. ¶¶ 35(e), 47; and (3) it invested too many of the funds' assets in low-yielding investments in order to cover the accounts' near-term tax liabilities.

Relying on SLUSA, which prohibits individuals from filing class actions involving fifty or more people seeking to vindicate state-law securities-related claims, the district court granted Fifth Third's motion to dismiss for failure to state a claim. This appeal followed.

II.

We give fresh review to a district court's order to dismiss a claim under Civil Rule 12(b)(6). *Mitchell v.*

McNeil, 487 F.3d 374, 376 (6th Cir. 2007). We must accept all allegations in the complaint as true. *Id.* And we must determine whether the allegations plausibly state a claim for relief. *Ashcroft v. Iqbal*, U.S., 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

SLUSA was not enacted in a vacuum. In 1995, Congress passed the Private Securities Litigation Reform Act (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, which curbed "perceived abuses" of federal class-action securities litigation by imposing special requirements and obstacles on claimants filing such actions. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 81, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006); *see also* 15 U.S.C. §§ 77z-1, 78u-4. After PSLRA became law, some claimants responded by "avoid[ing] the federal forum altogether," bringing "class actions under state law, often in state court" instead. *Dabit*, 547 U.S. at 82.

That apparently was not what Congress had in mind. In 1998, it sought to close the gap in coverage by enacting SLUSA. To "prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of" PLSRA, *Dabit*, 547 U.S. at 82 (quoting SLUSA, § 2), SLUSA expressly prohibits certain state law class actions:

> (1) Class action limitations.
>
> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (A) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1). SLUSA prohibits a claimant from filing a class action when four things are true: (1) the class action is "covered," which means it involves more than fifty members; (2) the claims are based on state law; (3) the action involves a "covered security," which means a nationally listed security; and (4) the complaint alleges "an untrue statement or omission of a material fact in connection with" buying or selling a covered security or a "manipulative or deceptive device or contrivance in connection with" buying or selling a covered security. 15 U.S.C. § 77p(b); *accord id.* § 78bb(f)(1); *see also In re Enron Corp. Sec.*, 535 F.3d 325, 338-39 (5th Cir. 2008).

The Supreme Court has construed the Act's expansive language broadly. *Dabit*, 547 U.S. at 85-86. A former Merrill Lynch stock broker, Dabit filed a state-law class-action securities claim alleging that his employer fraudulently manipulated stock prices, causing him, other brokers and their clients to hold onto overvalued stocks. *See id.* at 75. "A narrow reading of the statute," the Court concluded, would fail to respect "ordinary principles of statutory construction," would "undercut the effectiveness" of PSLRA and would "run contrary to SLUSA's stated purpose." *Id. at 86.* In holding that the Act barred Dabit's claim, the Court thus "presum[ed] that Congress envisioned a broad construction" of SLUSA's preclusive reach. *Id.*

Today's parties share some common ground. They agree that this action involves (1) a "covered class

action" because it includes more than fifty class members, (2) state-law claims and (3) "covered securities," namely the proprietary Fifth Third mutual funds. *See* 15 U.S.C. §§ 78bb(f)(5), 77p(f). That leaves the last question: Does the amended complaint allege an "untrue statement" or a "material omission" of fact "in connection with the purchase or sale" of Fifth Third mutual funds or allege that the Bank used a "manipulative or deceptive device or contrivance in connection with the purchase or sale" of Fifth Third mutual funds? *See* 15 U.S.C. §§ 78bb(f)(1), 77p(b). If either one is true, SLUSA bars the complaint.

Segal's amended complaint alleges misrepresentations, material omissions and manipulation. Consider: it alleges that Fifth Third failed to inform trust beneficiaries that their trust accounts would be invested in proprietary mutual funds; that the Bank carried out a "planned corporate scheme" that was "intended to (and did) lure grantors, testators, and others to designate [Fifth Third as trustee]," Am. Compl. ¶¶ 25, 29; that the Bank purported to "provide planning 'advice' under the guise that the advice was customized when, in fact, it [was] not," Am. Compl. ¶ 35; that the Bank "did not deal honestly, ethically, fairly, and/or in good faith" with the class, Am. Compl. ¶ 6; that the Bank intentionally and "knowingly overcharged" its trust clients, Am. Compl. ¶ 75; and that the Bank's policies amounted to a "scheme." Am. Compl. ¶¶ 25, 29, 38-39, 49-51, 59, 64, 66-67, 70, 75, 84. The complaint incorporates each allegation and makes them applicable to all counts of the complaint.

The amended complaint also alleges that Fifth Third made misrepresentations to the trust beneficiaries and otherwise manipulated them "in connection

with" the sale of Fifth Third mutual funds, a conclusion that follows from *Dabit*. *See U.S. Mortgage, Inc. v. Saxton*, 494 F.3d 833, 844 (9th Cir. 2007). The "in connection with" clause, *Dabit* held, has the same meaning as the same words used in § 10(b) of the Securities Exchange Act of 1934 and *Rule 10b-5*. *See Dabit*, 547 U.S. at 85-86; *see also* 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(c). Before the passage of SLUSA, courts had construed the "in connection with" clause "flexibly," not "technically and restrictively," *S.E.C. v. Zandford*, 535 U.S. 813, 819, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002) (internal quotation marks omitted), requiring only that "the fraud alleged coincide with a securities transaction—whether by the plaintiff or by someone else," *Dabit*, 547 U.S. at 85 (internal quotation marks omitted). Because Congress could "hardly have been unaware" of this broad construction when it chose to use the same phrase in SLUSA, *Dabit* held that the same meaning applies to both sets of laws. 547 U.S. at 85; *see Siepel v. Bank of America*, 526 F.3d 1122, 1127 (8th Cir. 2008); *Saxton*, 494 F.3d at 844.

The amended complaint satisfies this modest requirement. All of Segal's counts—breach of fiduciary duty, unjust enrichment, breach of contract—revolve around Fifth Third's decision to buy mutual fund shares. Segal's allegations do not merely "coincide" with securities transactions; they depend on them. *Cf. Siepel*, 526 F.3d at 1124 (concluding that SLUSA prohibits "state-law claims that a trustee breached its fiduciary duty by failing to disclose conflicts of interest in its selection of nationally-traded investment securities"). Under these circumstances, the district court properly concluded that SLUSA requires the dismissal of this complaint.

Segal first quarrels with the district court on the ground that it failed to respect the following disclaimer in his amended complaint: "None of the causes of action stated herein are based upon any misrepresentation or failure to disclose material facts to plaintiffs . . . ." Am. Compl. ¶ 2. How, Segal says, can he be tagged with alleging what he expressly disclaimed?

It is not that simple. Courts may look to—they must look to—the substance of a complaint's allegations in applying SLUSA. Otherwise, SLUSA enforcement would reduce to a formalistic search through the pages of the complaint for magic words—"untrue statement," "material omission," "manipulative or deceptive device"—and nothing more. But a claimant can no more elude SLUSA's prohibitions by editing out covered words from the complaint than by disclaiming their presence. For the same reason a claimant does not have the broader authority to disclaim the applicability of SLUSA to a complaint, he cannot avoid its application through artful pleading that removes the covered words from the complaint but leaves in the covered concepts. *See Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005); *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 702 (5th Cir. 2004).

To do otherwise would "frustrate the objectives" of PSLRA and SLUSA, *Dabit*, 547 U.S. at 82, and re-open the "'federal flight' loophole" SLUSA sought to close. *Spielman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 (2d Cir. 2003). The question under SLUSA is not whether the complaint uses the prohibited words: "an untrue statement or omission of a material fact" or a "manipulative or deceptive device or contrivance." It is whether the

complaint covers the prohibited theories, no matter what words are used (or disclaimed) in explaining them. *See Rowinski*, 398 F.3d at 300; *Dudek v. Prudential Secs., Inc.*, 295 F.3d 875, 879-80 (8th Cir. 2002); *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1094 (11th Cir. 2002).

Although Segal disclaims any allegation of "misrepresentation or failure to disclose material facts," Am. Compl. ¶ 2, the remainder of the amended complaint shows otherwise. Four paragraphs after the disclaimer, Segal announces that "[t]he gravamen of this Complaint is that the defendants did not deal honestly, ethically, fairly, and/or in good faith with Fifth Third's Beneficiaries." Am. Compl. ¶ 6. And he corroborates this "gravamen" of the complaint with allegations of fraud, manipulation and "scheme."

Segal persists that this approach "magically transform[s]" his claims from "garden-variety" state-law claims into federal securities claims. Reply Br. at 12. But that is not true. SLUSA does not convert state-law claims into federal securities claims. It says that certain types of state-law claims may not be filed in state court as a class action if the class includes more than fifty people. Nothing about this procedural restriction on how Segal vindicates his state-law rights converts his claims into federal claims.

Also unavailing is Segal's contention that the state-law claims do not depend upon allegations of misrepresentation or manipulation—and thus are not material to them. But that again is not how SLUSA works. The Act does not ask whether the complaint makes "material" or "dependent" allegations of misrepresentation in connection with buying or selling securities. It asks whether the complaint includes these types of allegations, pure and simple. Recall:

"No covered class action may be maintained . . . alleging—an untrue statement or omission of a material fact . . . or that the defendant used or employed any manipulative or deceptive device in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b); *accord* 15 U.S.C. § 78bb(f)(1). Add to this the Supreme Court's admonition that SLUSA's prohibitions must be "broad[ly]" construed, *Dabit*, 547 U.S. at 86, and it becomes clear that we have no license to draw a line between SLUSA-covered claims that must be dismissed and SLUSA-covered claims that must not be.

In his reply brief, Segal brings to our attention a decision from the Third Circuit that appears to provide some support for his position on this point. "While it may be unwise . . . to set out extraneous allegations of misrepresentations in a complaint," the court says, "the inclusion of such extraneous allegations does not operate to require that the complaint must be dismissed under SLUSA." *LaSala v. Bordier et Cie*, 519 F.3d 121, 141 (3d Cir. 2008). But this language from *LaSala* is not only *dicta*—the court had already resolved the issues at hand—it also contradicts an earlier decision from the Third Circuit. In *Rowinski*, 398 F.3d at 300, the court held that whether an alleged misrepresentation is "an essential legal element" is "immaterial under [SLUSA]." We agree—with *Rowinski*, that is. The terms of SLUSA do not speak to "material," "dependent" or "extraneous" allegations; they speak to covered allegations. A "broad" interpretation of the Act leaves no room for this inquiry—a difficult one at that to implement—which is why we reject it and why (we presume) *Rowinski* rejected any such suggestion earlier.

A similar flaw undermines Segal's argument that SLUSA prohibits claims only if the underlying factual allegations would otherwise give rise to an actionable claim under federal securities laws. That is not what the Act says. And *Dabit*, at any rate, held that SLUSA precludes even state law claims that would not meet the "policy"-based standing limitations the Court has attached to Rule 10b-5, 547 U.S. at 84, which explains why several other circuits have rejected this narrow interpretation. *See, e.g.*, *Anderson v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 521 F.3d 1278, 1285-86 (10th Cir. 2008) (collecting cases).

Segal claims that this approach allows SLUSA to "eliminate[ ] any remedy against an unfaithful fiduciary" short of removing the trustee. Appellant's Letter Br. at 8. "Congress," Segal adds, "could not have intended to prevent trust beneficiaries from pursuing damage claims for mismanagement against trust fiduciaries." *Id.* Yet Congress has done nothing of the sort. "The Act does not deny any individual plaintiff, or indeed any group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist." *Dabit*, 547 U.S. at 87. SLUSA leaves open many avenues for claimants like Segal to vindicate their rights.

Segal is right that "the plaintiff is the master of the complaint," Appellant's Br. at 10, but that is why he must take responsibility for the allegations included in it. SLUSA may be unforgiving when it applies, but it details in clear language when that is so. It puts claimants to a choice. Here, for example, Segal could have filed an identical complaint on behalf of himself and up to forty-eight others and avoided SLUSA preclusion. Or he could have filed a complaint on behalf of a large class of plaintiffs, so long as he

complied with the requirements of PSLRA. Or he might have been able to press some class action counts—perhaps the breach of contract claim—in a complaint that included no covered allegations. But where, as here, a complaint meets the relatively straightforward requirements of 15 U.S.C. §§ 77p(b), 78bb(f)(1), we must dismiss the action. This approach accords with the "broad construction" presumption in *Dabit*, 547 U.S. at 86, and follows the example of several of our sister circuits. *See, e.g., Anderson*, 521 F.3d at 1286 (10th); *Rowinski*, 398 F.3d at 300 (3d); *Miller*, 391 F.3d at 702 (5th); *Dudek*, 295 F.3d at 879-80 (8th). We also note that Segal may yet bring his individual claims against Fifth Third in state court, as the district court dismissed those claims without prejudice.

III.

For these reasons, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

Case No. 1:07-cv-348

DANIEL J. SEGAL, *et al*,
Plaintiffs,

vs.

FIFTH THIRD BANK, N.A., *et al*,
Defendants.

March 25, 2008, Decided
March 25, 2008, Filed

OPINION

JUDGES: Sandra S. Beckwith, *Chief Judge, United States District Judge.*

OPINION BY: Sandra S. Beckwith

ORDER

Before the Court is Defendants' motion to dismiss Plaintiff's Amended Class Action Complaint. (Doc. 22) Plaintiffs oppose the motion (Doc. 23), and Defendants have replied. (Doc. 25) Plaintiffs have also filed supplemental authorities in support of their opposition. (Docs. 26, 28)

Plaintiff Daniel Segal is a beneficiary of a fiduciary trust account administered by Defendant Fifth Third

Bank. Defendant First Third Bancorp is the Bank's corporate parent. Segal generally alleges that the Bank breached its fiduciary duties, unjustly enriched itself at his expense, and breached its contract to properly administer the trust account in accordance with fiduciary duty principles.

Segal alleges individual claims on his own behalf, and also brings claims on behalf of two defined Rule 23(b)(3) classes:

> (a) The Beneficiary Class, consisting of all beneficiaries of trust, estate, or other fiduciary accounts for which the Bank or any of its predecessors acted as a trustee, executor, or other form of corporate fiduciary at any time from March 1, 2001 to the present (the "Class Period'); and
>
> (b) The Proprietary Funds Class, consisting of all Beneficiary Class members whose trust, estate, or other fiduciary accounts, for which the Bank or any of its predecessors acted as a trustee, had, directly or indirectly, Proprietary Fund assets allocated to any such account at any time during the Class Period.

(Am. Complaint ¶ 57)

According to the complaint, the Bank administers several types of fiduciary accounts and provides related services, including customized portfolio management. (¶ 10) The Bank failed to exercise good faith by engaging in self-interested or imprudent asset placement decisions for those accounts, primarily the Bank's purchase of proprietary mutual funds. (¶ 8) The Bank also failed to "undertake a trust-by-trust analysis" of each fiduciary account and instead, uniformly decided that trust assets be invested "to the extent feasible, in Fifth Third Funds." (¶¶ 23 &

24) The Bank's prior practice of offering "highly individualized trust administration and asset management services" paid for with fiduciary account fees, was and is being replaced by a standardized portfolio management approach adopted due to various Bank acquisitions and expansions. This standardized, lower-level approach "force-placed" the Bank's fiduciary accounts into the Bank's proprietary funds. This conduct violated the Bank's fiduciary obligations, and disregarded potential adverse tax consequences to the account beneficiaries. (¶¶ 25-28) This misconduct resulted in increased income to the Bank from higher fees charged to the accounts for advisory, administrative, and other services. Investing the fiduciary funds in the Bank's proprietary mutual funds also permitted the Bank to achieve economies of scale in its mutual fund operation that benefitted the Bank, to the detriment of the account beneficiaries. (¶¶ 29-32)

Plaintiff alleges that the objectionable conduct is ongoing, because the Bank is continuing to seek merger acquisitions, which will permit the Bank to further dilute the value of its fiduciary and trust services provided to the account beneficiaries. (¶¶ 37-38)

Jurisdiction is alleged based on diversity between the parties. Segal is an Ohio resident, but he alleges that other members of the putative class are residents of other states. The Bank is a federally chartered bank and Bancorp is an Ohio corporation, both domiciled in Cincinnati. (¶¶ 43-46) Segal alleges supplemental jurisdiction is proper over his individual claims under 28 U.S.C. § 1367. He alleges state law claims for breach of fiduciary duty (Count I), unjust enrichment (Count II), breach of contract premised on the underlying fiduciary instruments

(Count III), and another fiduciary duty claim (Count IV) based on the improper investments of amounts segregated in the accounts to satisfy tax obligations. Segal brings an individual claim for breach of fiduciary duty (Count V), arising out of other specific Bank actions taken as Trustee of the Segal Trusts.

Defendants move to dismiss the complaint. They argue that the class claims are pre-empted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). Alternatively, they argue that each of the state law claims should be dismissed on the merits because, for various reasons, they fail to state claims as a matter of law.

DISCUSSION

1. Standard of Review.

A Rule 12(b)(6) motion operates to test the sufficiency of the complaint. In considering such a motion, the court is required to construe the complaint in the light most favorable to the Plaintiff, and accept as true all well-pleaded factual allegations. *See Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), and *Roth Steel Products v. Sharon Steel Corp.*, 705 F.2d 134, 155 (6th Cir. 1983). The court need not accept as true legal conclusions or unwarranted factual inferences. *Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998). A court will, though, accept all reasonable inferences that might be drawn from the complaint. *Fitzke v. Shappell*, 468 F.2d 1072, 1076-77 at n.6 (6th Cir. 1972).

As noted in *Mayer v. Mylod*, 988 F.2d 635, 637 (6th Cir. 1993):

> The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. . . . As the court stated in *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957), '[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'

The Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L. Ed. 2d 929 (2007) casts some doubt on these long-standing pleading requirements. While some uncertainty exists in this Circuit on *Twombly*'s reach,[1] *Twombly* requires allegations "plausibly suggesting" the existence of a cognizable claim. *Id.* at 1964. However, *Twombly* does not alter this Court's duty to construe the complaint in the light most favorable to plaintiff.

2. SLUSA Preclusion.

Congress enacted SLUSA in 1998, in response to concerns that state law class actions were being utilized to circumvent the Private Securities Litigation Reform Act ("PSLRA"), enacted in 1995. PSLRA was intended to correct certain perceived abuses of class action securities litigation by, among other things, imposing heightened pleading standards upon class complaints for securities fraud. SLUSA's preclusion provision states:

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[1] *See Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541-542 (6th Cir. 2007).

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77p(b). The statute also authorizes removal to federal court of covered class actions originally filed in state court. The statute defines a "covered" class action as one brought on behalf of more than 50 people; a "covered" security is one traded nationally, listed on a regulated exchange, and subject to the federal securities laws. In addition to these requirements, a state law class action is precluded if the claims are based on a misrepresentation or omission of material fact (or the use of a deceptive device or scheme) "in connection with" the purchase or sale of a security. *See Dudek v. Prudential Secs., Inc.*, 295 F.3d 875, 879 (8th Cir. 2002).

It must be kept in mind that SLUSA does not actually or completely pre-empt any and all state law claims that may have something to do with the buying and selling of securities. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 87, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006): "SLUSA does not actually pre-empt any state cause of action. It simply denies plaintiffs the right to use the class action device to vindicate certain claims. The Act does not deny any individual plaintiff, or indeed any

group of fewer than 50 plaintiffs, the right to enforce any state-law cause of action that may exist."

A. Misrepresentation or Omission.

Defendants contend that the class claims, while styled under state law, are in essence claims based on misrepresentations or omissions of material facts (or a fraudulent or deceptive scheme) concerning the purchase of Fifth Third mutual funds. They point to Plaintiffs' original complaint in this case, which more squarely alleged a plan or scheme hatched by Defendants to shift fiduciary funds managed by the Bank into Fifth Third "Captive" mutual funds. (*See, e.g.*, Doc. 1, ¶¶ 20-23) Defendants responded to the original complaint with a motion to dismiss based on SLUSA preclusion, pointing out the specific allegations of the original complaint that required that result. (*See* Doc. 12) Plaintiffs elected to amend, and removed most of the direct allegations of "misrepresentations," "omissions," and "schemes." Defendants now argue that Plaintiffs may not "plead around" SLUSA by cloaking their claims with state law titles, as SLUSA is an exception to the well-pleaded complaint rule.

A review of the 92 paragraphs pertaining to the amended complaint's class claims leads to the inescapable conclusion that Plaintiffs' action is premised upon a central factual allegation: that Fifth Third misrepresented or failed to disclose material facts, and/or engaged in a manipulative or deceptive course of conduct, when Fifth Third invested Plaintiffs' fiduciary funds into the Bank's proprietary mutual funds. That allegation is clearly the gravamen of Plaintiffs' state law claims.

Plaintiffs argue that their amended complaint disavows any such contention, because in paragraph 2 they specifically allege that their claims are not based upon any misrepresentation, or failure to disclose, or fraudulent scheme. They suggest they are "only" alleging classic state law claims based on Defendants' alleged breach of fiduciary duties owed to Plaintiffs. The Court disagrees.

The fact that Plaintiffs avoid using the words "misrepresentation" and "omission" does not control the result. It is clear that the court can and should disregard the particular labels or titles Plaintiffs may affix to their claims when determining if SLUSA precludes those claims. It is the substance of the allegations about the defendants' conduct that is key to this determination. *See, e.g., Professional Mgmt. Assocs. Employees Profit Sharing Plan v. KPMG LLP*, 335 F.3d 800, 803 (8th Cir. 2003) [holding that a negligence claim is "essentially" a precluded securities fraudclaim]; *Dudek v. Prudential Secs.*, 295 F.3d 875 (8th Cir. 2002), finding SLUSA precluded claims based on placement of tax-deferred annuities in plaintiffs' retirement accounts, and which alleged that the defendant-insurer benefitted from resulting higher fees and costs incurred.

Here, similarly, Plaintiffs allege that increased account fees resulted from Defendants' "asset allocation" decisions (¶ 7); that the bank enriched itself by making those "asset allocations" (¶ 9); and that the Bank engaged in self-dealing by investing in its proprietary funds rather than "independently analyz[ing] and monitor[ing] trust assets." (¶ 14) Whatever the state law mold these allegations may also fit, it is inescapable that the key conduct underlying all the claims is the Bank's misrepresentations

or omissions about, or deceptive scheme involving, the Bank's purchase of its proprietary mutual funds with fiduciary assets. All of the class allegations of self-dealing, breach of duty, or unjust enrichment, flow from that central fact. While the alleged misconduct may have breached a contract or a fiduciary duty, it is also a "quintessential example of a fraudulent omission of a material fact under the federal securities laws." *Felton v. Morgan Stanley Dean Witter & Co.*, 429 F. Supp. 2d 684, 693 (S.D.N.Y. 2006).

Several district courts that have addressed almost identical allegations against different banks and investment firms have reached the same conclusion. *See Kutten v. Bank of America, N.A.*, 2007 U.S. Dist. LEXIS 63897 (E.D. Mo., August 29, 2007), finding SLUSA precluded breach of fiduciary duty and unjust enrichment claims against the bank; *Siepel v. Bank of America*, 239 F.R.D. 558(E.D. Mo. 2006) [same]; *Spencer v. Wachovia Bank, N.A.*, 2006 U.S. Dist. LEXIS 52374 (S.D. Fla., May 10, 2006) [same]; *Rabin v. JP Morgan Chase Bank, N.A.*, 2007 U.S. Dist. LEXIS 57437 (N.D. Ill. Aug. 3, 2007) [same].

Plaintiffs have submitted an unpublished order from the Southern District of New York in *Hughes v. LaSalle Bank*, where the court concluded that SLUSA does not preclude claims for breach of fiduciary duty, tortious interference and unjust enrichment. (*See* Doc. 26, Exhibit 2) The district court's order states that the court was responding to the Second Circuit's remand of the case for an evidentiary hearing on subject matter jurisdiction over the plaintiffs' original complaint. According to the district court order, the Second Circuit posed questions about both the existence of diversity and whether SLUSA preclusion might apply. This Court

is not bound by that district court's conclusion about whether SLUSA applies to the pleadings and parties before the court in that case. There is no definitive guidance from the Sixth Circuit on this question. The Court finds the reasoning set forth in *Kutten*, *Siepel*, *Spencer*, and *Rabin* to be a correct application of SLUSA preclusion to the facts and claims alleged here.

In addition, two district courts within this Circuit have followed similar reasoning to apply SLUSA preclusion in slightly different factual settings. *Beary v. Nationwide Life Ins. Co.*, 2007 U.S. Dist. LEXIS 83137 (S.D. Ohio, September 17, 2007) (Sargus, J.) involved breach of fiduciary duty and unjust enrichment claims brought by retirement and deferred compensation plans against Nationwide, which sponsored those plans. Nationwide had negotiated revenue sharing agreements with various mutual fund companies in return for investing the plans' assets in the mutual funds. The plaintiff plans alleged that Nationwide breached its fiduciary duty to them by enriching itself with the revenue sharing fees, resulting in loss of value to the plans. The district court held: "Although Plaintiff does not specifically use the words 'untrue statement' or 'omission' in the Complaint, the substance of Plaintiff's claim is that Nationwide misrepresented a relationship with Investment Advisors or, at a minimum, omitted to disclose material facts about the relationship. In the Court's view, Plaintiff's allegations fall within the scope of SLUSA." *Id.* at *11.

In *Horattas v. Citigroup Financial Markets Inc.*, 532 F. Supp. 2d 891, 2007 U.S. Dist. LEXIS 67411 (W.D. Mich., September 12, 2007), the district court held SLUSA precluded a state law class action

brought against the investment services provider to a cemetery owner. The owner allegedly depleted and absconded with millions of dollars of funds held in irrevocable endowment care accounts for the benefit of the cemeteries, looting the cemeteries' trust assets. The district court concluded that SLUSA precluded the state law class claims against the investment advisor to the owner, finding that they alleged a fraudulent scheme concerning covered securities. The allegations of negligence or "imprudent investment" did not immunize the class claims from preclusion.

The same result applies here. Plaintiffs' allegation that Fifth Third breached its fiduciary duty, or was unjustly enriched as a result of the investments in Fifth Third mutual funds, does not protect their class claims from SLUSA.

B. "In Connection With" Covered Securities.

Plaintiffs do not dispute that Fifth Third's proprietary mutual funds are covered securities for SLUSA purposes. They argue this is irrelevant, because Defendants' conduct was not "in connection with" the purchase or sale of those securities. Plaintiffs argue they had no knowledge of the purchases and made no purchases themselves, leaving all asset allocation decisions to the Defendants. They also argue that their claims are not based on the purchase of the mutual funds per se, but upon the breach of fiduciary duty inherent in Fifth Third's decision to purchase those funds.

This argument is foreclosed by *Dabit*. There, the Supreme Court held that SLUSA's phrase "in connection with" must be construed consistently with settled case law construing the same phrase used in Section 10(b) and Rule 10b-5. While standing to bring

a private suit under those authorities is limited to purchasers and sellers, limitation was based on policy considerations raised by permitting any private right of action under the securities laws. *See Dabit*, 547 U.S. at 84 (discussing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)). The Section 10(b) standing limitation does not mandate imposing a limiting construction of the phrase "in connection with" the purchase or sale of securities. Citing its prior cases,[2] the Court noted it is enough for 10(b) and 10b-5 actions that the fraud "coincide with a securities transaction—whether by the plaintiff or by someone else." *Id.* at 85. The Court then noted that Congress "could hardly have been unaware" of this broad construction when it chose to use the same phrase in SLUSA. *Id.* Thus the Court reversed the Second Circuit's decision finding that the plaintiffs—brokers who were fraudulently induced to retain or delay selling securities, and were not purchasers or sellers—fell outside of SLUSA's preclusive scope.

Plaintiffs' reliance on pre-*Dabit* decisions such as *Norman v. Salomon Smith Barney, Inc.*, 350 F.Supp.2d 382 (S.D.N.Y. 2004) is therefore misplaced. Norman was clearly driven by the fact that plaintiffs were not purchasers or sellers of securities.

Plaintiffs also cite *LaSala v. UBS*, 510 F.Supp.2d 213 (S.D.N.Y. 2007), a post-*Dabit* opinion finding that a claim against UBS for aiding and abetting a breach of fiduciary duty was not precluded by SLUSA. The specific allegation against UBS in that case, as the district court's opinion makes clear, was the fact that

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[2] *SEC v. Zandford*, 535 U.S. 813, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002), and *United States v. O'Hagan*, 521 U.S. 642, 117 S. Ct. 2199, 138 L. Ed. 2d 724 (1997).

UBS received money from two other private banks in Switzerland, and then transferred those funds to different accounts at the direction of the account holders. The holders had perpetrated a massive fraudulent stock scheme and the funds in question were allegedly proceeds of illegal stock sales. But the allegations against UBS were limited to the transfer of money from one account to another account. The district court noted that if UBS had facilitated the sale of the stock, the result would likely have been different. *Id.* at 243-244. The facts at issue in that case clearly differentiate it from the facts underlying Plaintiffs' claims in this case.

Plaintiffs also rely on *Burns v. Prudential Securities, Inc.*, 218 F.Supp.2d 911 (N.D. Ohio 2002), where the district court found that SLUSA did not apply to a claim for breach of fiduciary duty against a broker who sold the securities held in plaintiffs' accounts without their notice or consent. There was no allegation that the broker acted fraudulently, as the district court noted he sold the holdings because he was concerned that the market was about to crash. (It did not crash, but kept rising.) Plaintiffs alleged that Prudential, the broker's employer, failed to disclose material facts and made false statements about the broker's actions after the fact. The district court found the claims were not pre-empted, because the false statement or omissions took place after, and independently of, the broker's sales, and had no relationship to his decision to sell. The claims against Prudential had nothing to do with the securities in question, but rather were premised on Prudential's failure to honestly and accurately deal with plaintiffs about the situation caused by their broker. Thus the claims were not "in connection with" the sale of the securities.

Plaintiffs allegations here are far different, and distinguish the result in *Burns*. Plaintiffs allege a course of fraudulent conduct involving Fifth Third's decision to purchase Fifth Third mutual funds, a course of conduct they allege is continuing with every acquisition or merger by Fifth Third.

For these reasons, the Court concludes that the class claims alleged in Plaintiffs' Amended Complaint are precluded by SLUSA, and are therefore dismissed with prejudice. Given this result, the Court does not reach Defendants' alternative arguments concerning the merits of the state law claims.

Counts I through IV are also brought by Daniel Segal individually, and Count V is exclusively Segal's individual claim against the Defendants. His individual claims are not precluded by SLUSA. However, Segal's allegations make clear that diversity is lacking between Segal and the Defendants. The Court will therefore dismiss Segal's individual claims without prejudice.

CONCLUSION

Counts I through IV brought on behalf of the defined class are dismissed with prejudice because they are precluded by SLUSA. Segal's individual claims in Counts I through V are dismissed without prejudice.

SO ORDERED.

THIS CASE IS CLOSED.

Dated: March 25, 2008

/s/ Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-3576

DANIEL J. SEGAL, on behalf of himself, his minor children and all others similarly situated,
Plaintiff-Appellant,

v.

FIFTH THIRD BANK, N.A., *et al.*,
Defendants-Appellees.

December 16, 2009, Filed

OPINION

JUDGES: BEFORE: SUTTON and GRIFFIN, *Circuit Judges*; and LIOI,* *District Judges*.

ORDER

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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* Hon. Sara E. Lioi, United States District Judge for the Northern District of Ohio, sitting by designation.